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In the

Supreme Court of the United States

Number 876

ATHENIAN REALTY CORPORATION,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY
AND
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Athenian Realty Corporation, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on December 1, 1964.

OPINIONS BELOW

Neither the opinion of the District Court for the Northern District of Texas nor the opinion of the Court of Appeals for the Fifth Circuit was reported. A Per Curiam opinion was rendered by the Court of Appeals (T. 270).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered on December 1, 1964 (T. 272). Petition for Rehearing was filed by Petitioner on December 14, 1964 (T. 275) and denied on January 4, 1965 (T. 289). The judgment is copied in the appendix at page 17. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the district court was invoked under 28 U.S.C. 1332(1).

QUESTIONS PRESENTED

Two questions are herewith presented:

1. In a fact situation wherein a plaintiff seeks declaratory relief under the declaratory judgment Act, 28 U.S.C. 2201, can the trial court render an elaborate declaratory judgment declaring the rights of the defendants in broad and general language and, simultaneously therewith, refuse to declare the rights of the plaintiff, especially where the definition and declaration of rights of the defendants does not inferentially declare the rights of the plaintiff? In other words, can a district court of the United States render a declaratory judgment that is partial in two senses: (1) granting partial relief rather than total relief by declaring the defendant's rights but not the plaintiff's rights, and (2) favoring the defendants by declaring their rights but not those of the plaintiff?

2. While the commission of error, or the affirmance of error, does not constitute grounds for certiorari, in a fact

situation where the trial court committed overwhelming error by totally ignoring the facts presented by the record and rendering a judgment directly contrary to the factual record, ignoring fundamental and unquestioned rules of law, and where this judgment contrary to the undisputed facts is affirmed by the Circuit Court of Appeals by a Per Curiam opinion, which, in turn, ignores the factual record and fundamental rules of law, is not the record one which denies due process of law and requires a reversal or a rendition? In short, where the trial proceedings in their totality lack substance, is not due process denied? This question is of especial importance at the present time because of the use of the Per Curiam process of disposition in the Fifth Circuit Court of Appeals. See "The Overloaded Fifth Circuit: A Crisis in Judicial Administration", 42 Texas Law Review 949 through 982, October, 1964.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Question One involves 28 U.S.C. 2201. Question Two involves the due process clause of the Fifth Amendment to the Constitution of the United States.

STATEMENT AND REASONS FOR GRANTING THE WRIT

Part I of the Statement:

Petitioner owns an unimproved tract of land on the edge of downtown Dallas. A lease transaction involving the erection of improvements on this land between petitioner

and a prospective lessee was ruined by Southwestern Bell Telephone Company asserting in writing (1) an easement dividing the land into two segments, and (2) a claim that the petitioner could not build for a distance of five feet on either side of the alleged easement (T. 30, 42).

In order to resolve the controversy and ascertain whether petitioner could build on the land or not, and in order to avoid stagnation of this land because of this written claim, petitioner filed suit against respondents seeking a declaratory judgment setting forth the correlative rights of the parties (T. 47).

The trial court's judgment denied petitioner all relief, but, in paragraph 2 of its Conclusions of Law, which the Circuit Court construed as part of the judgment (T. 271), the trial court declared the rights of the respondents as follows:

> "2. Defendants have and own a valid and subsisting easement by grant and prescription in and upon the portion of the land described in Plaintiff's Complaint lying in what was formerly Floyd Street, for: the construction, reconstruction, maintenance, and operation of their telephone and telegraph lines, conduits, cables, equipment, and fixtures, the increase or other change in their cables, conduits, fixtures and equipment to any extent necessary or proper in the conduct of their business; and the right of entry and exit from said property for all said purposes."

Thus, the trial court rendered a unilateral declaratory judgment elaborately declaring and protecting respondent's rights by broad and general language covering present and future demands, but totally ignoring petitioner's rights on

the grounds that a declaration as to whether petitioner could build on its own land would be "advisory".

As grounds for certiorari, petitioner submits that no district court can play favorites between litigants and define and declare one party's rights while simultaneously refusing to declare and define the rights of the opposing litigant, especially, as here, where the definition and declaration of one party's rights does not inferentially declare and define the rights of the other litigant.

If a trial court decides not to render a declaratory judgment for one litigant, it must forbear rendering a declaratory judgment for the other litigant.

Part II of the Statement:

In this case, the trial court, in its conclusions of law, ruled as follows:

1. That respondents were in rightful possession and in wrongful possession of the alleged easement area at the same identical time. This is contrary to all known rules of law.

2. That the ten-year statute of limitations ran in nine years. This is contrary to all known rules of law.

3. That improvements effected by respondents during a limited period in which respondents had an unquestioned right to occupy the premises constituted the predicate for estoppel against the petitioner, although the petitioner had no power or authority to prevent the construction of the improvements at the time they were made. This is contrary

to all known rules of law; this flaunts all rules covering the fundamentals of estoppel.

4. That Article 1416 of the Revised Civil Statutes of the State of Texas created a perpetual easement for respondents despite the fact that the undisputed, written trial record (which was composed almost entirely of stipulations) and the written briefs of respondents submitted to the trial court, admitted that the limited term easements were obtained from franchises from the City of Dallas, Texas and entry was made pursuant to such franchises. A judgment cannot be rendered without any facts to support it. This is contrary to all known rules of law.

5. *As a predicate for judgment*, the court found that petitioner could not "reform" an instrument petitioner did not even introduce into evidence and upon which petitioner did not rely. In short, the trial court created and contrived a fifth predicate for judgment which, like all others, had no foundation in the record. A trial court cannot create or contrive facts to support its judgment. This is contrary to all known rules of law.

6. The trial court "construed" a written instrument contrary to its plain English wording, although the instrument had been approved by an attorney for respondents, and although there was no claim of fraud, accident, or mistake; this was a sixth instance of the trial court rendering judgment contrary to the actual record in the case. This is contrary to all known rules of law.

7. Seventhly, this Alice-in-Wonderland case is rendered more incredible by the fact that respondents, in their writ-

ten brief on appeal, are in direct conflict with their written trial brief. The first brief submitted by petitioner on appeal predicted that respondents would have to reverse their trial position on appeal in order to sustain this incredible judgment, and the three subsequent briefs of petitioner pointed out the predicted reversal of position.

For example, on page 65, paragraph 1 of its original appellate brief, petitioner stated: "* * * the appellant is going to tell this appellate court the same things it told the trial court — something the appellees cannot do and support their inconsistent positions."

On page 2, paragraph 2 of petitioner's reply brief to appellees' brief, petitioner pointed out:

> "Page 7 of appellees' trial brief states as follows:
>
> "Even if there were some doubt on this score, which there is not, Southwestern Bell Telephone Company, in addition, possessed at that time full rights to the use of the city streets for communications purposes by virtue of a franchise which had been granted by the City in 1918, and transferred to the Southwestern Bell Telephone Company in 1925 (Stipulation, Item 6). The franchise was for a local telephone exchange system, and expressly provided for the right on the part of the grantee, among other things, to use the city streets for its cables and underground conduits." (Emphasis by appellant)"
>
> "On page 19 of its appellate brief, appellee now contends:
>
> 'The long distance company had no choice in the matter; if it enters a city, it may use the streets only under and in accordance with the terms of the statute.' (Emphasis by appellant)"

On page 7, paragraph 3 of the same brief, petitioner pointed out:

"Bottom of page 7 and top of page 8 of appellees' trial brief (now in New Orleans):

'The franchise contained, in Section 11, elaborate provisions requiring the grantee to make all connections required and to furnish the necessary facilities for providing adequate long distance service.' (Emphasis that of appellant)"

"Page 22 of appellees' appellate brief:

'Appellant fails to recognize that the telephone franchises granted by the City of Dallas were for a local telephone exchange system only. Thus the City of Dallas did not grant an easement for the facilities which appellees installed in Floyd Street.' (Emphasis that of appellant)"

In substance, petitioner prays for certiorari because of the absence of any judicial standards.

Petitioner, of course, well realizes that the mere commission of error by the trial court or by the circuit court is not sufficient grounds for certiorari and is not of sufficient importance for the Supreme Court to consider on the grounds of policy. However, in view of the torrential amount of work being presently cast upon the Circuit Court of Appeals (see "The Overloaded Fifth Circuit: A Crisis in Judicial Administration", 42 Texas Law Review 949), it is important that the Supreme Court immediately announce a rule which would constitute a check-rein upon per curiam opinions being rendered which not only gloss over mere error, but which also permit judgments to be rendered contrary to all the facts and all the law, thereby constituting a denial of

due process of law. In other words, when a trial in the district courts of the United States is nothing but form without substance, due process of law is violated, and the Circuit Courts of Appeals must be cautioned that in their haste to dispose of the volume of cases before them, that due process of law cannot be denied.

In short, what petitioner is saying is this: the Supreme Court must announce a rule to prevent judicial anarchy through the use of the per curiam rubber-stamp mechanism. When a trial court commits overwhelming error, as in this case, this constitutes a denial of due process of law, and certiorari will be granted in any case where the circuit court rubber-stamps overwhelming error through the per curiam process.

In an attempt to protect its land from being fragmented into two disastrous parts, petitioner filed its original appellate brief and three additional briefs in the Fifth Circuit Court of Appeals, setting forth, in detail, the illegality, the inequity, the oddity, the inconsistency, the lack of any factual or legal basis of the trial court judgment, and repeatedly asked that a written opinion be rendered in this case because of the belief that no court could write a written opinion which would justify the trial court judgment. What does it avail petitioner that its property rights are "protected" by rules of law if these rules of property law are destroyed by per curiam action (or inaction)?

If this court should fail to contain the per curiam process now, the judicial process loses meaning. These words

are not prophetic; they are a description of present condition.

When a trial court ignores the facts of the case and files conclusions of law which are as untenable and as inconsistent within themselves as those pointed out in this petition for certiorari, there is something seriously wrong, which should never be affirmed by a rubber-stamp, per curiam opinion.

The way to circumscribe and limit the per curiam process is to announce a rule stating that where the record is ignored by the trial court, or where overwhelming error is committed by the trial court, due process of law is denied and certiorari will lie. This rule is as important in the field of property as are the various rules and actions of the Supreme Court of the United States in protecting employee rights in the F.E.L.A. line of cases. The rule requested is an antidote to judicial anarchy. When the lower courts go too far by rendering judgments contrary to the facts and by asserting law that is not only erroneous, but is also fatuous, the entire judicial process is erased (not merely eroded), and due process is obviously denied.

Unless certiorari be granted, the Supreme Court will sanction an inverted hierarchy of courts wherein the supreme power is at the bottom and merely the pomp and panoply is at the top.

The American Telephone & Telegraph Company may not realize or admit it now, but its ultimate interests would be

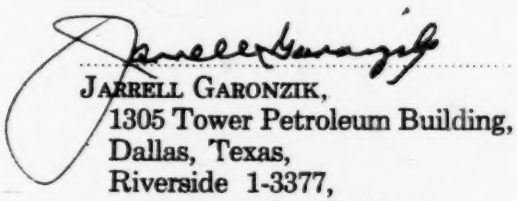
better served by certiorari being granted than by its being denied.

In order that the reader of this application may have absolute confidence in this application, petitioner suggests that the clerk of the Circuit Court of Appeals for the Fifth Circuit be requested to mail the following to the reader for examination:

1. Petitioner's original appellate brief
2. Respondent's brief
3. Petitioner's Reply Brief
4. Petitioner's Summary of This Case
5. Petitioner's Brief After Oral Argument

In short, when petitioner alleges an unconstitutional deprivation of rights through capricious action below, petitioner does not want the reader to believe that petitioner is being capricious.

Respectfully submitted,



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Attorney for Petitioner.

CERTIFICATE OF SERVICE

A copy of this brief has been mailed to the following: Messrs. Ed Gossett, J. H. Hand, and James A. De Bois, at 308 South Akard Street, Dallas 1, Texas, and Messrs. Henry W. Strasburger and Leo Hoffman of Strasburger, Price, Kelton, Miller & Martin, at 2200 Fidelity Union Tower, Dallas 1, Texas, by properly addressed, stamped, sealed and posted envelopes.

JARRELL GARONZIK

Appendix I: Statutory and Constitutional Provisions

28 U. S. C. 2201:

"In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. June 25, 1948, c. 646, 62 Stat. 964; May 24, 1949, c. 139, §111, 63 Stat. 105; Aug. 28, 1954, c. 1033, 68 Stat. 890; July 7, 1958, Pub. L. 85½ 508, §12(p), 72 Stat. 349."

Fifth Amendment to the Constitution of the United States:

> "No person shall * * * be deprived of * * * property * * * without due process of law."

Appendix II: Copy of Opinion, Judgment and Order Denying Rehearing

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21,542

ATHENIAN REALTY CORPORATION,
Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(December 1, 1964.)

Before TUTTLE, Chief Judge, and BROWN and GEWIN, Circuit Judges.

PER CURIAM: In this action for declaratory judgment after extensive pre-trial proceedings and a full trial on the merits, the District Court rejected the Appellant-property owner's claim that the Telephone Company had no easement in the property in question. The findings of fact and conclusions of law to this effect are amply sustained by the record.

Appellant asserts that the trial Court did not adequately declare the rights of the parties. Although in this respect the formal judgment may be deficient, the conclusions of law in the Court's memorandum opinion, which are deemed to be incorporated in the judgment, set forth an adequate declaration of the rights of the respective parties insofar as they could be determined at this stage.

AFFIRMED.

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21542

D. C. Docket No. 3-63-284-Civil Action

ATHENIAN REALTY CORPORATION,
Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, et al.,
Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before TUTTLE, Chief Judge, and BROWN and GEWIN, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of

the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Athenian Realty Corporation, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

December 1, 1964

Issued as Mandate:

U. S. COURT OF APPEALS
FILED
JAN 4, 1965
EDWARD W. WADSWORTH
CLERK

In the

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21,542

ATHENIAN REALTY CORPORATION,

Appellant,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, et al.,

Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(January 4, 1965),

On Petition for Rehearing

Before TUTTLE, Chief Judge, and BROWN and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby DENIED.